No. 99-1125

Supreme Court, U.S.
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In The

Supreme Court of the United States

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,

Petitioner,

v.

BLACKWELL, SANDERS, MATHENY, WEARY & LOMBARDI, L.C., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENT BLACKWELL SANDERS MATHENY WEARY & LOMBARDI, L.L.P. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Dated: February 3, 2000

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COUNTER STATEMENT OF QUESTION PRESENTED

Respondent respectfully suggests that the issue framed by petitioner is more accurately stated as follows:

Whether it was an abuse of discretion to deny petitioner relief under Fed. R. Civ. P. 60(b) when petitioner's same request for relief was previously rejected twice by the courts: first in petitioner's interlocutory appeal to the Eighth Circuit in 1995, a decision this Court declined to review in 1996, and second in petitioner's motion for leave to file a second rehearing petition or to recall the mandate filed with the Eighth Circuit in 1998, which this Court separately declined to review in January 1998.

PARTIES TO THE PROCEEDING

The named respondents to this case are: Reimer & Koger Associates, Inc.; Ronald Reimer; Kenneth H. Koger; Clifford W. Shinski; Brent Messick; Robert Crew; Sherman Dreiseszum; I.I. Ozar; Frank Sebree; Peat, Marwick, Mitchell & Co.; KPMG Peat Marwick; Robert Spence; Thomas S. Morgan, co-executor of the estate of Frank S. Morgan; Marilyn J. Morgan, co-executor of the estate of Frank S. Morgan; Shook, Hardy & Bacon, through C. Patrick McLarney, substituted for Shook Hardy law firm; and Blackwell Sanders Matheny Weary & Lombardi, L.L.P., now known as Blackwell Sanders Peper Martin L.L.P.

RULE 29.6 STATEMENT

Respondent Blackwell Sanders Matheny Weary & Lombardi, L.L.P. is a Kansas City, Missouri-based law firm, with other offices in and outside of Missouri, operating as a limited liability partnership under the law of the State of Missouri.[1] Its member attorneys possess complete ownership of the firm, and the firm possesses no other ownership interests.

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[1] The firm's name is now Blackwell Sanders Peper Martin L.L.P.

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STATEMENT OF THE CASE[2]

Petitioner Kansas Public Employees Retirement System (KPERS) is the retirement plan for the employees of the State of Kansas, including all Kansas state-court judges. KPERS claims that it lost a substantial amount of money in the 1980's on its direct placement and other venture capital investments. In the 1990's, KPERS sued everyone involved with those unsuccessful investments, including the lawyers who prepared the transaction documents at the direction of KPERS's investment advisors. All of the lawsuits were filed in Kansas state courts. This case is the only one that was removed to federal court.

This suit pertains to KPERS's 1986 investment in Home Savings Association, a federally insured savings and loan. Respondent Blackwell Sanders served as counsel to KPERS's investment advisor, Reimer & Koger Associates, Inc. (R&K), for the first Home Savings investment transaction from January to May 1986. *KPERS v. Blackwell, Sanders, Matheny, Weary & Lombardi, L.C.*, 114 F.3d 679, 683 (8th Cir. 1997) (*KPERS VI*). Blackwell Sanders prepared documents necessary to close the investment transaction but did not represent R&K or KPERS on a continuing basis. In December 1986, after the investment had been made, articles in the *Kansas City Star* raised questions regarding the wisdom of KPERS's investment in Home Savings and certain conflict of interest issues involving Michael Russell, KPERS's chairman. *Id.* In 1991, KPERS filed this lawsuit. *Id.* at 684. Blackwell Sanders,

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[2] This statement is substantially similar to the statement contained in Blackwell Sanders's opposition to KPERS's petition for certiorari, case No. 97-471.

however, was not sued until 1995 – almost nine years after its involvement in the initial Home Savings investment ended. *Id.* at 685.

The principal legal issues that KPERS now raises were first decided by a court in 1995. *KPERS v. Reimer & Koger Assocs., Inc.*, 61 F.3d 608, 615 (8th Cir. 1995), *cert. denied*, 516 U.S. 1114 (1996) (*KPERS III*). At that time, KPERS sought interlocutory review to determine what statute of limitations was applicable to KPERS's claims. In that appeal the Eighth Circuit held that (1) when a case is removed under 12 U.S.C. § 1441a(*l*)(3), as this one was, the limitations law of the forum – here, Missouri – applies; (2) under Missouri law, KPERS's claims are subject to Missouri's five-year statute of limitations unless "fully barred" by a shorter statute of limitations in the state where the lawsuit originated; and (3) the applicable Kansas limitations statutes[3] fully barred KPERS's claims because the special ten-year "KPERS" statute of limitations,[4] while applying "retroactively" to extend the limitations period for accrued but not yet barred claims, did not revive already barred claims such as KPERS's claims

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[3] Kan. Stat. Ann. §§ 60-512, 513 (three years for statutory claims; two years for tort claims).

[4] Shortly after the defendants filed their motions to dismiss in state court, the Kansas legislature adopted a ten-year statute of limitations applicable only to civil actions brought by KPERS. Kansas Laws 1992, ch. 321, § 21 (codified at Kan. Stat. Ann. § 60-522). After the defendants argued that the new statute did not apply to claims already expired, the legislature amended the statute so that it would be "construed and applied retroactively." 1993 Kansas Session Laws ch. 227 (H.B. 2211) (codified at Kan. Stat. Ann. § 60-522(c)).

against Blackwell Sanders. *Id.* at 615. This Court denied KPERS's petition for writ of certiorari in that appeal. *KPERS v. Reimer & Koger Assocs., Inc.*, 516 U.S. 1114 (1996).

Applying *KPERS III* on remand, the District Court concluded that KPERS's claims were barred by the two and three-year Kansas statutes of limitation and entered summary judgment in favor of all of the defendants. *KPERS v. Reimer & Koger Assocs., Inc.*, Nos. 92-0922 & 95-0819, Order Granting Defendants' Motions for Summary Judgment (W.D. Mo. June 3, 1996). KPERS appealed this decision and the Eighth Circuit affirmed.[5] *KPERS VI*, 114 F.3d 679 (8th Cir. 1997). KPERS argued that under Kansas law no statute of limitations applied to its claims

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[5] KPERS continues to claim that the Eighth Circuit decided this appeal with "unusual haste," apparently because the case was set for oral argument in March 1997 after the calendar of arguments for that month had been issued. Although KPERS implies that the setting of this argument was motivated by improper considerations, a much more plausible explanation exists. As a matter of sound judicial administration, and in order to conserve judicial resources, related cases are generally assigned to the same panel that decided earlier appeals in the same case. The KPERS cases have all been decided by panels consisting of Judges Theodore McMillian (St. Louis, Missouri); John R. Gibson (Kansas City, Missouri) and either Pasco M. Bowman (Kansas City, Missouri) or David R. Hansen (Cedar Rapids, Iowa). The court's annual Kansas City court session was scheduled for March 1997, and Judges McMillian, Bowman, and Gibson were already scheduled to sit in Kansas City that month. Moreover, many of the attorneys involved in this case are located in Kansas City. Thus, it was much more convenient for the court and the parties for the case to be scheduled for argument in Kansas City in March 1997.

because maintaining KPERS is a governmental, not a proprietary, function of the State of Kansas. In *KPERS VI*, the court of appeals held that KPERS was prohibited by the law-of-the-case doctrine from relitigating the applicability of the two and three-year Kansas statutes of limitations even though KPERS's argument regarding KPERS's functions was not specifically addressed in *KPERS III*. Further, the court found that application of the law-of-the-case doctrine would not result in a manifest injustice, *id.* at 687, because KPERS's arguments were foreclosed by then-controlling Kansas Supreme Court precedent. *In re Midland Indus.*, 703 P.2d 840 (1985). In *Midland Industries*, the Kansas Supreme Court held that "[m]aintaining KPERS is a *proprietary* function of the state." *Id.* at 843. Thus, the Eighth Circuit held that the "clear holdings" of *Midland Industries* "compel rejection of KPERS's argument" that it is not subject to any statute of limitations because its investments were made in a governmental capacity. *KPERS VI*, 114 F.3d at 688.

The Eighth Circuit issued its opinion in *KPERS VI* on May 13, 1997, and denied KPERS's petition for Rehearing and Suggestion for Rehearing En Banc on June 12, 1997. KPERS filed a second rehearing petition after the mandate issued that was also denied.

On June 27, 1997, after the Eighth Circuit had already denied KPERS's initial petition for rehearing, the Kansas Supreme Court held, in another case brought by KPERS relating to its investments, that KPERS acts in a governmental capacity when it invests its funds. *KPERS v. Reimer & Koger Assocs., Inc.*, 941 P.2d 1321, 1325-26 (1997). The court characterized its earlier statement to the contrary in *Midland Industries* as "pure dicta," *id.* at 1340, and

asserted that the Eighth Circuit's decision "regarding governmental-proprietary functions" was incorrect, *id.* at 1343. The Kansas Supreme Court acknowledged, however, that the Eighth Circuit's holding in *KPERS VI* was that KPERS's governmental-function argument was barred under the law-of-the-case doctrine. *Id.* at 1338. And, moreover, the new Kansas decision did not address the impact of the Missouri borrowing statute on the analysis. KPERS filed a certiorari petition with this Court in 1997 seeking review of the Eighth Circuit's decision in *KPERS VI*, arguing that the new decision by the Kansas Supreme Court required reversal. This Court again denied certiorari. *KPERS v. Blackwell, Sanders, Matheny, Weary & Lombardi*, 522 U.S. 1068 (1998).

After KPERS's second certiorari petition seeking review of the statute of limitations question was denied, KPERS returned to the District Court and filed a motion for relief under Rule 60(b) raising the *same arguments* it raised in *KPERS III* and *KPERS VI* and the earlier petitions filed in this Court. The District Court denied KPERS's motion, holding that it was not empowered under Rule 60(b) to revisit issues previously decided by the appellate courts and, in any event, KPERS was not entitled to relief because it had not demonstrated exceptional circumstances or equitable justification warranting the extraordinary relief of reopening the final judgment. *KPERS v. Russell*, Nos. 92-0922; 92-0819, Order Denying Plaintiff's Motion for Relief From Judgment Pursuant to Rule 60(b)(6) (W.D. Mo. August 19, 1998). The Eighth Circuit affirmed this decision in October 1999.

KPERS v. Reimer & Koger Assocs., Inc., 194 F.3d 922 (8th Cir. 1999).

REASONS FOR DENYING THE WRIT

I. This Court Should Not Grant a Petition for a Writ of Certiorari Because the Issue Raised By Petitioner Was Raised in Two Previous Petitions to This Court That Were Denied, There is No Conflict or Need For Clarification as to the Application of Rule 60(b), and the Case Will Have No Precedential Value.

The question raised by KPERS in its latest petition has been considered twice before by both the District Court and the Eighth Circuit. This Court has twice denied certiorari. It should do so again.

KPERS first raised the issue of what statute of limitations applies to its claims in a 1995 interlocutory appeal to the Eighth Circuit. KPERS lost, and this Court denied KPERS's request for review of that decision. KPERS raised this issue in a second appeal to the Eighth Circuit in 1997. KPERS lost again, and again this Court denied KPERS's request for review. This is KPERS's third attempt to obtain a different ruling on the statute of limitations issue. This petition has no more merit than KPERS's earlier filings.

KPERS's attempt to use Rule 60(b) to revisit an issue previously decided by the appellate court is improper. *See, e.g., Colorado Interstate Gas v. Natural Gas Pipeline*, 962 F.2d 1528, 1534 (10th Cir. 1992), *cert. denied*, 506 U.S. 956 (1992); *Bethea v. Levi Strauss & Co.*, 916 F.2d 453, 456 (8th Cir. 1990); *Seese v. Volkswagenwerk, A.G.*, 679 F.2d 336, 337

(3d Cir. 1982); 11 Charles Alan Wright et al., Federal Practice And Procedure § 2873, at 439 (2d ed. 1995) (noting that under Rule 60 "the district judge is not free to flout the decision of the appellate court"). Both the District Court and the Eighth Circuit correctly concluded that Rule 60(b) cannot be used for this purpose and KPERS can identify no contrary authority. There is no conflict here. Nor is there any need for the Court to clarify the applicability of Rule 60(b) to KPERS's issue, an issue that has already been finally decided. This case can have no precedential value and there is no reason to grant the petition. *See Rice v. Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. 70, 79 (1985); *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

Relief may be obtained under Rule 60(b)(6) only under exceptional circumstances. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 (1988) (citing *Ackermann v. United States*, 340 U.S. 193 (1950)). As the court of appeals noted, generally a change in the law governing the case, after the case has been decided, is not alone sufficiently extraordinary to warrant such relief. *See, e.g., Biggins v. Hazen Paper Co.*, 111 F.3d 205, 212 (1st Cir. 1997), *cert. denied*, 522 U.S. 952 (1997); *Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 131 F.3d 625, 628-30 (7th Cir. 1997); *Booker v. Singletary*, 90 F.3d 440, 442 (11th Cir. 1996); *Batts v. Tow-Motor Forklift Co.*, 66 F.3d 743, 750 (5th Cir. 1995), *cert. denied*, 517 U.S. 1221 (1996); *DeWeerth v. Baldinger*, 38 F.3d 1266, 1272-74 (2d Cir. 1994), *cert. denied*, 513 U.S. 1001 (1994); *Dowell v. State Farm Fire & Cas. Auto Ins. Co.*, 993 F.2d 46, 48 (4th Cir. 1993); *Bailey v. Ryan Stevedoring Co.*, 894 F.2d 157, 159-60 (5th Cir. 1990), *cert. denied*, 498 U.S. 829 (1990); *Tomlin v. McDaniel*, 865 F.2d

209, 211 (9th Cir. 1989); *Seese*, 679 F.2d at 337; *Carter v. Romines*, 593 F.2d 823, 824 (8th Cir. 1979); *Collins v. City of Wichita, Kan.*, 254 F.2d 837, 839 (10th Cir. 1958). This is true because concern for the finality of judgments weighs against granting relief even where, as here, a state court later disagrees with the decision of a federal court interpreting that state's law. *DeWeerth*, 38 F.3d at 1272-74; *Batts*, 66 F.3d at 749-50; *Cincinnati Ins. Co.*, 131 F.3d at 628-29. Any other rule would be "tantamount to holding that the doctrine of finality does not apply to diversity judgments, a theory that has no basis in *Erie* or its progeny." *DeWeerth*, 38 F.3d at 1273-74. KPERS has demonstrated no additional reasons that merit abandoning principles of finality in this case, particularly since application of the Kansas Supreme Court's 1997 to this case would not change the outcome as to Blackwell Sanders and similarly situated defendants, as discussed more fully below.

Equitable considerations also weigh strongly against reopening the judgment, and such considerations are fully relevant to a Rule 60(b) request. *See Woods v. Kenan*, 173 F.3d 770, 780 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 187 (1999); *Samaras v. America's Favorite Chicken Co.*, 153 F.3d 268, 272 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 1251 (1999); *MIF Realty L.P. v. Rochester Assocs.*, 92 F.3d 752, 755-56 (8th Cir. 1996); *National Credit Union Admin Bd. v. Gray*, 1 F.3d 262, 266 (4th Cir. 1993); *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990); *Hugel v. McNell*, 886 F.2d 1, 6 (1st Cir. 1989); *Peacock v. Board of Sch. Comm'rs of Indianapolis*, 721 F.2d 210, 214 (7th Cir. 1983). As the courts below noted, KPERS's conduct in this litigation has been far from exemplary. Early in this case,

KPERS obtained an *ex parte* severance from a Kansas state court simply to frustrate removal. *KPERS v. Reimer & Koger Assoc., Inc.*, 4 F.3d 614 (8th Cir. 1993) (*KPERS I*), *cert. denied*, 511 U.S. 1126 (1994). Then KPERS filed parallel actions in state court for the purpose of subverting federal removal jurisdiction, *KPERS v. Reimer & Koger Assoc., Inc.*, 77 F.3d 1063, 1070 (8th Cir. 1996) (*KPERS IV*), *cert. denied*, 519 U.S. 948 (1996). The District Court concluded – and the Eighth Circuit agreed – that those suits were objectively unreasonable and brought in bad faith. *See KPERS v. Reimer & Koger Assoc., Inc.*, 165 F.3d 627, 629 (8th Cir. 1999) (*KPERS VIII*) (affirming award of attorneys fees against KPERS for unreasonably and vexatiously multiplying proceedings).

KPERS now suggests that it would be improper for it to be penalized for "asserting legitimate arguments against the exercise of federal court jurisdiction at the outset of the case, by denying [it] Rule 60(b)(6) relief to which [it is] otherwise entitled at the end of the case," when to obtain Rule 60(b) relief it must demonstrate that it made every effort to prevent the entry of the erroneous judgment. Petition at 20. But KPERS's efforts to oppose federal jurisdiction were *not* legitimate – it was sanctioned for improperly multiplying the litigation. And it cannot have been error for the courts below to consider KPERS's improper conduct in determining whether to exercise discretion and reopen a final judgment at KPERS's request. *Cf. Griffin v. Swim-Tech Corp.*, 722 F.2d 677, 681 (11th Cir. 1984) ("[T]his case is replete with inexcusable delay and numerous unjustified violations of the court's orders, which fully support the court's denial of relief under Rule 60(b)(6)"); *see also MIF Realty*, 92 F.3d

at 755-56; *National Org. For Women v. Operation Rescue*, 47 F.3d 667, 669 (4th Cir. 1995) (per curiam); *Nalco Chem. Co. v. Hydro Tech., Inc.*, 148 F.R.D. 608, 617 (E.D. Wis. 1993); *Sony Corp. v. S.W.I. Trading Inc.*, 104 F.R.D. 535, 541 (S.D.N.Y. 1985).

This case presents nothing more than the unremarkable issue of whether Rule 60(b) can now be used to compel a different result than the one already reached twice before by both the District Court and the Eighth Circuit. This narrow issue is not worthy of the Court's attention.

II. This Court Should Not Grant the Petition Because, Even If the Lower Court Were Reversed, the Ultimate Outcome to Blackwell Sanders and Other Defendants Would Be the Same.

Not only does this case lack general precedential value, but granting the petition would not even change the outcome as to respondent Blackwell Sanders and similarly situated defendants. Even if petitioner receives the relief it requests and obtains retroactive application of the Kansas Supreme Court's 1997 decision, its claims against Blackwell Sanders would still be time barred.

In *KPERS III*, the Eighth Circuit concluded that (1) the limitations law of the forum – Missouri – governs this case, and (2) KPERS's claims are subject to a five-year Missouri statute of limitations, Mo. Rev. Stat. § 516.120, unless those claims are "fully barred" by a statute in the state in which the cause of action arose – Kansas, *id.* § 516.190. *KPERS III*, 61 F.3d at 614. KPERS has not

challenged the applicability of the Missouri five-year statute of limitations or the District Court's finding that KPERS's claims against respondents accrued on December 23, 1986.[6] Thus, even under the Kansas Supreme Court's decision in *KPERS v. Reimer & Koger Associates, Inc.*, 941 P.2d 1321 (1997), any party KPERS failed to sue by December 23, 1991 is entitled to summary judgment.

Because KPERS did not assert claims against Blackwell Sanders until January 6, 1995 – more than eight years after the limitations period began to run – those claims would be time-barred under the Missouri statute of limitations. Therefore, application of the Kansas Supreme Court's decision, which does not even address the applicability of the Missouri five-year statute of limitations, would not change the result in this case, and Blackwell Sanders would still be entitled to summary judgment. Basic principles of fairness and justice, including the fact that KPERS has kept Blackwell Sanders in court for over five years on clearly time-barred claims, dictate that the case against Blackwell Sanders and similarly situated respondents should not be reopened. 11 Charles Alan Wright, et al., Federal Practice And Procedure § 2857, at 262 (2d ed. 1995) (noting that under Rule 60 "[r]elief will not be given if substantial rights of the moving party have not been harmed by the judgment").

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[6] KPERS inexplicably maintains that all of these issues would be subject to reconsideration if this Court remands the case. The issues were properly before the court in *KPERS III* and KPERS should not be allowed to relitigate them.

CONCLUSION

KPERS's third certiorari petition, like its earlier two on substantially the same issue, should be denied.

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Dated: February 3, 2000